United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: July 27, 1999

TO: Richard L. Ahearn, Regional Director
Region 3

FROM: Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Value Investors, Inc. d/b/a Concord Associates
Case 3-CA-21909

This Section 8(a)(5) case was submitted for advice on whether the Employer, otherwise a putative successor to a mixed unit of guards and nonguards, incurred a bargaining obligation under Burns[1] after the Union disclaimed interest in representing the guards in that unit.

Predecessor employer Concord operated a resort hotel with a unit of around 500 employees, including around 40 guards, covered by a bargaining agreement. In 1997, Concord filed for bankruptcy and in November 1998 closed its doors and ceased operating. In January 1999, the Employer purchased the Concord's facility at a bankruptcy auction. The Employer's long term plan was to change the facility from a full service hotel into a convention, conference and meeting resort facility. The Employer's short term plan, however, was to open the golf courses and the golf clubhouse lodge.

In February the Union requested recognition asserting that the Employer was a successor. The Employer declined, stating that there was no continuity of operations. Around March, the Employer hired necessary personnel for the operation of the golf courses and maintain the surrounding grounds. The Employer hired 48 employees, 47 of which were predecessor unit employees who performed their previous jobs. On April 15 and May 15 respectively, the Employer opened the golf courses and the clubhouse lodge. The Employer states that it intends to begin renovating the main hotel by the end of 1999 and to open 500 rooms by mid-2000. However, the Employer has yet to obtain the necessary $70 million funding needed for this expansion.[2]

---

[1] NLRB v. Burns International Security Services, 406 U.S. 272 (1972).

[2] The main hotel had 1260 rooms; the golf clubhouse lodge had only 42 rooms.

On May 10, the Union made a second request for recognition, limiting this request to a unit "which excludes guards." The Employer declined, repeating the rationale of its prior refusal, adding the that the Union represented an inappropriate mixed unit of guards and nonguards.

We conclude, in agreement with the Region, that there is substantial continuity between Concord and the Employer's current operation, and that the Employer incurred a bargaining obligation as a result of the Union's May 10 bargaining demand in an appropriate unit excluding guards.

In determining whether an employer is a Burns successor, the Board focuses on whether there is "substantial continuity" between the enterprises and whether a majority of the employees of the new employer in the appropriate unit had been employed by the predecessor.[3] Concerning "substantial continuity," the Board examines the totality of the circumstances including whether there is continuity of the business operation, plant, workforce, working conditions, supervision, etc.[4] The Board views these factors from the employees' perspective, i.e., considering whether they would view their job situations as essentially unchanged.[5] Finally, the Board has found that a successor's bargaining obligation is not defeated "simply because a mere portion of the predecessor's operation has been restarted, so long as the successor's employees at issue are an appropriate unit for bargaining, and that a majority of them were employees of the predecessor."[6]

---

[3] Burns International Security Services, supra, 406 U.S. at 280-281.

[4] Fall River Dyeing & Finishing Corp. v. NLRB, 482 U.S. 27, 43 (1987) (citations omitted). See also Morton Development Corp., 299 NLRB 649, 650 (1990).

[5] Fall River Dyeing, 482 U.S. at 43, citing Golden State Bottling Co. v. NLRB, 414 U.S. 168, 184 (1973), and NLRB v. Jeffries Lithograph Co., 752 F.2d 459, 464 (9th Cir. 1985); Capitol Steel & Iron Co., 299 NLRB 484, 486 (1990).

[6] Tree-Fiber Co., 328 NLRB No. 51 (1999), sl. op. at 2. See also Bronx Health Plan, 326 NLRB No. 68 (1998); M.S. Management Associates, 325 NLRB No. 217 (1998); Capitol Steel & Iron Co., 299 NLRB 484 (1990); CitiSteel USA, 312 NLRB 815 (1993), enf. den. 53 F.3d 350, 149 LRRM 2196 (D.C. Cir. 1995).

In the instant case, we conclude that there was substantial continuity between the Concord's former large scale hotel operation and the Employer's limited continuation of that in the golf clubhouse. In Morton Development Corp., supra, the successor substantially changed the predecessor employees' duties and the clients they served when it changed the predecessor's business from a residential home for retarded adults to a nursing home for the elderly. The Board nevertheless found a bargaining obligation noting that "cooks still cooked; maintenance persons still repaired; and aides still aided residents."[7] In the instant case, the predecessor's employees are performing the same tasks for the same type of customers. From their perspective, their jobs were essentially unchanged, even though the Employer was conducting a much smaller operation, running only the golf lodge and not the attached large hotel. On that point, it is well settled that the Employer's successorship status is not defeated merely because it succeeded to a small portion of the predecessor's unit.[8]

Finally, we conclude that the Employer's second defense, that the Union had represented an inappropriate mixed unit of the predecessor Concord's employees, is unavailing. First, the Union's May 10th bargaining demand asserted representative status in an appropriate unit.[9] The Union's May 10th bargaining demand was in an appropriate unit because the Union disclaimed representation of the 40 guard employees and the resulting smaller unit was otherwise appropriate. As noted supra, the Board will find successorship in an appropriate unit even where such a unit is but a small portion of the predecessor's unit. Second, the Employer cannot argue that it has no bargaining obligation because its predecessor Concord had no enforceable bargaining obligation merely because the Union had represented an inappropriate mixed unit. The predecessor Concord had voluntarily and thus lawfully

---

[7] 299 NLRB at 652.

[8] See Ranch-Way, Inc., 183 NLRB 1168 (1970) finding a bargaining obligation where the successor purchased only one of the predecessor's 16 operations; Tree-Fiber, supra, ("the fact that the Respondent's operation employs 50 employees, where the predecessor employed 500, is not significant in itself." sl. op. at 2).

[9] We agree that the Employer incurred no bargaining obligation from the Union's February demand for recognition in the mixed unit. Field Bridge Associates, 306 NLRB 322 (1992).

recognized the Union in that mixed unit which was covered by a bargaining agreement. There is nothing in the Act which precludes such a voluntary recognition. Thus, since the prior recognition was not per se unlawful, it cannot in any way taint the presumption of majority status that flowed to the Union in the smaller appropriate unit. Thus, the Union was lawfully entitled to a presumption of majority status flowing from the bargaining agreement covering the prior, lawfully recognized mixed unit.

In sum, the Employer is a Burns successor because there was "substantial continuity" between its limited operation and the predecessor Concord's larger operation, and the Union otherwise represented a majority of its employees in an appropriate unit.

B.J.K.